

[i]

January 7th, 1717.

INFORMATION

In Name of

His Majesty's Advocate General,

A G A I N S T

The Claimants upon the Estates in *Scotland*,
forfeited by the late Rebellion.

APETITION having been given in to your Lordships, in Name of His Majesty's Advocate General, on the first of December last, complaining, That notwithstanding by the several Laws now in Force in Scotland concerning Treason, particularly by the late Act, Intituled; *Act for appointing Commissioners to enquire into the Estates of certain Traitors, &c.* not only the Right and Property of all the Estates that formerly belonged to the several Persons mentioned in the laid Petition, convicted and attainted for Treason, but likewise the Possession actual and real thereof is vested in His Majesty; yet upon Application of certain Creditors or Claimants upon the said forfeited Estates, your Lordships had in July last, in Absence of the said Advocate General, sequestrate these Estates, and placed Factors upon them, whereby the Possession of the Crown was inverted, contrary to the true Intent and Meaning of the Law: And therefore praying, That the said Factors might be removed, and the Possession and Management of the forfeited Estates left to the King, and to those who are by Law empowered to manage and take Care of all such Particulars as are vested in His Majesty, for the Uses and Ends mentioned in the said

There were Answers put in to this Petition by the Claimants upon the said forfeited Estates, wherein they did set forth, That by an Act, Intituled, *Act for encouraging of Superiors, Vassals, Landlords and Tenants in Scotland, who do and shall continue in their Duty and Loyalty to His Majesty, King George,* it is expressly provided, *That no Conviction or Attainder on Account of the high Treason, or Treasons therein mentioned, shall bunt or exclude the Right or Diligence of any Creditor remaining peaceable or dutiful, for Security or Payment of any true, just and lawful Debt contracted before the Commission of any of the foresaid Crimes.* And that by the other Act mentioned and referred to in the Advocate's Petition, it is provided, *That nothing in that Act contained shall extend, or shall be construed to extend to take away, alter or diminish any Right, Title, Benefit or Advantage whatsoever, which any Creditors or others continuing peaceable, and in dutiful Allegiance to His Majesty, are, shall, or may be entitled unto by Virtue, or in Pursuance of the said Act made in the First Year of His Majesty's Reign, Intituled, Act for encouraging all Superiors, &c. or to repeal, alter, or make void any of the Provisions, Matters or Things in that Act contained.* From whence they did contend, That since their Debts were secured, and that their Diligence was not to be excluded by the Conviction or Attainder of their Debtors, they were entitled to demand a Sequestration of their Debtors Estates, that being a Diligence competent and proper for recovering Payment of their lawful Debts. And your Lordships having heard Parties in your own Presence upon the Petition and Answers, upon the 27th of December last, you were pleased to ordain Informations to be given in on both Sides.

That this Debate may be the more distinctly determined, the Lords would please to observe, That what has hitherto been pleaded, and is still insisted on in Behalf of the Crown, resolves into the following Propositions, *First*, That by the Nature of Forfeiture, and the Analogy of our Scots Law with Relation thereto, even before the Union, and without Regard to the late Act, appointing Commissioners to enquire of the forfeit Estates, both the Property and Possession of Estates forfeited does belong to the Crown, and that the preserving intire the Rights, Debts and Diligences of Creditors, Vassals, &c. was nowise inconsistent with the Possession's being *lodged in the Hands of the Crown.* *2d*, That by the forecited Act, appointing Commissioners to enquire of the forfeited Estates, not only the Right, but Possession of those Estates is vested in His Majesty, as they were enjoyed and possessed by the Rebels before their Attainder. *3d*, That the Right

A

and

and Possession being so vested in His Majesty, those Estates cannot legally be sequestred. *And 4to, That all this is nowise inconsistent with, but very agreeable to the several Clauses in the forecited Acts, whereby it is provided, That the Rights and Diligences of Creditors shall not be hurt or excluded by the Forfeiture or Attainer of their Debtors.*

As to the first of these, it's to be observed, That Forfeiture does not arise only from the Penal Laws, statuting, That Persons guilty of Treason should lose their Estates as a Punishment for so hainous a Crime, but from our Feudal Customs, and is of the Nature of a Recognition, whereby the Feus of a Vassal do return to the Superior, in Case of Ingratitude, Infidelity, or Breach of Trust committed by the Vassal against the Superior, by whom the Law presumes the Feu was given to the Vassal, and by that Grant the Vassal is bound to Fidelity towards his Superior, and is no longer entitled to his Feu than he continues dutiful and faithful: And the Consequence of this is, That as by Recognition not only the Right, but Possession of the Feu, does immediately devolve upon the Superior, so must it do by Forfeiture, which is of the same Nature with Recognition. *2do, As it seems plain by the Nature of the Thing, That the Possession must immediately devolve upon the Crown by Forfeiture, as well as the Property, so it's confirmed in the strongest Terms by our statute Law: For by the 2d Act, 9th Parliament, James VI. it is expressly statute and declared, That not only the Right and Power to dispone whatsoever Lands and Heretages pertained to Persons convicted of Lese-Majesty does belong to the Crown, but that the King or his Donator shall immediately be entred to the Possession of whatever was possessed by the forfeiting Person; yea further, That the Donator shall not be removed from that Possession for Five Years thereafter, That in the mean Time they may have Time and Commodity (these are the Words of the Law) to search and seek out the Tacks, Rights, Titles and Provisions of them whom of their Right and Security proceeds, and whae Place they succeed unto by Forfeiture and Escheat.*

And here it's to be notic'd, That this Possession was not thought inconsistent with the Preservation of the Rights of Creditors, for Recovery of their just Debts; for tho' at that Time no Debts were secur'd against the Forfeiture, or did affect the forfeit Estate, excepting those that were made real by Infestment, and that Infestment confirmed by the King or Superior; yet such Debts as were confirmed by the Superior, and made real by Infestment, were always secure against the Effects of the Forfeiture, and were a Burden upon the Estate; and yet the Possession was by this Act of Parliament given to the Donator, and he ordain'd to continue the Possession for five Years, without Regard to those Debts, altho' these Debts were as effectual, and as well secur'd at that Time, as the Debts of the Claimants upon the forfeited Estates can be, by any Clause in the late Acts of Parliament above cited.

And it may be likewife further noticed, That tho' afterwards, by another Act of Parliament made in the Year 1592, the Security in Favours of Creditors of forfeiting Persons, was further extended, very probably, so as to comprehend all lawful Creditors, whether personal or real; yet there's no Appearance or Evidence, that any Alteration was made as to the Crown, or Donator's Right to possess. It's true, this Act 1592 is not now extant; but that there was such an Act is plain from the Act 2d, 1601, which is now extant, and contains to be delete out of the Books of Parliament; and altho' that Act 1593 mentions the other, as made only in Favours of Vassals of forfeit Persons, yet our Lawyers take Notice of it as an Act in Favours of Creditors, as well as Vassals, particularly my Lord Stair, Page 423, of his Institutions.

From the Year 1593, to the 1644, our Law continued in the same State, with Relation to this particular, and no Debts were secured against Forfeiture, except those that were confirm'd by the Superior; but by the 33d Act of that Parliament, an ample Security is provided to Vassals, Creditors and Cautioners of forfeited Persons; but at the same Time, no Alteration made upon the Crown, or Donator's Right to possess. On the Contrary, by the 34th Act of that very same Parliament, the heretale Debts owing to the Earl of Crawford, the Earl of Forth, and Lord Thban, who were then forfeited, were ordain'd to be paid in to the Use of the Publick, and the Committees of Estates therein mentioned impowered to discharge those Debts, notwithstanding, that by the immediate preceding Act, the Rights of Creditors were secur'd in the most ample Manner, and thereby became a Burden upon those Debts which were to be paid in for the Use of the Publick; which is a Demonstration, That the securing the Rights of Creditors, and of Action or Execution at their Instance, was not thought to be any Bar to the Possession of the Crown, or anywise inconsistent with the Payment of the Profits of the forfeited Estates in to the Treasury.

After the Restauration, these Acts in the 1644 were rescind by the general Act Rescissory; and from that Time, till the 1690, at least till the 33d Act of the Convention, in the Year 1689, was made, Creditors had no Security against the Effects of Forfeiture: But altho' that Act, together with the 33d Act of the Parliament 1690, did renew the Security that was formerly competent to Creditors, and did rescind the fore-cited 2d Act, 9th Parl. Ja. 6th, in a great Part; yet not as to that Clause concerning the Crown, or Donator's entring to Possession, or continuing therein for a competent Time, until the Rights of the forfeited Person may be recovered, or the Debts inquir'd into, only since the Act 1690, the Crown or Donator cannot possess, without being accountable to Creditors, in case their Debts be found just; because that is inconsistent with the Security given to Creditors Debts; but the Possession is nowise inconsistent with the Security given to Creditors: And therefore as to that, the old Law seems to continue in full Force.

Nor can it be pretended, That the Clause in the forecited Act, Anno 1mo Georgii, makes any Alteration

Alteration in this Matter, because it's only a salving Clause, providing that the Rights and Diligences of Creditors *shall not be hurt, not suffer, not be excluded*, but does not give the Creditors any new Right, or their Diligences any further Force than what they had before, only leaves them in the same State they were before that Act ; and consequently the Possession must continue where it was lodg'd by former Laws, until such Time as the Diligences can be applied, and the Debts inquir'd into, as will afterwards be further cleared.

Thus the first Proposition, insisted on in Behalf of the Crown, seems very plain, That the Crown's being vested both in Property and Possession, was never by our ancient Law reckon'd inconsistent with the Creditors Debts and Diligences being secur'd as Burdens upon the Property of the Estate forfeited ; and the same Thing will be further illustrated from several Instances in the Roman Law, in answering the Objections propon'd by the Claimants, against what is here pleaded.

In the next Place, it's very evident from the Words of the Act appointing Commissioners to enquire of forfeit Estates, That both the Property and Possession of the whole forfeited Estates are vested in the Crown, for the Uses therein mentioned, and that the Payment of the true and lawful Debts of the Creditors is indeed one of the Uses for which the said Estates are so vested in His Majesty by that Act ; The Words of the Law are the strongest that can be devised, *That all and every the Castles, Honours, Lordships, Mannours, Messuages, Lands, &c. or Hereditaments whatsoever, and of what Nature or Kind soever they be, whereof any Person attainted, or to be attainted within the Time, and for the Causes mentioned in that Act, was, were, or shall have been seis'd or possess'd of, or interested in, or entitled into, &c. shall be forfeited to His Majesty, His Heirs and Successors, and shall be deem'd vested and adjudged to be in the actual and real Possession of His Majesty, without any Office or Inquisition thereof, thereafter to be taken or found.* And by another Clause, Persons possessed of forfeited Estates are ordained to give Notice thereof to the Commissioners of Enquiry, before the 24th of November 1716, conform to the Method there prescribed ; and then follows these Words, *And shall yield and pay in to the Receipt of the Exchequer of England and Scotland respectively, all and every the Rents reserved, and payable of, and for the said Estate, or Estates, or otherwise account for the Profits of the same, during the Time of his or their Occupation thereof, after the said 24th of June 1715, until such Sale or Sales so to be made thereof.* And by another Clause, *That no Person or Persons whatsoever having any Estate, Right, Title or Interest in Law or Equity, into, or out of any of the said forfeited or forfeitable Estates, or Premises, hereby vested in His Majesty, as aforesaid, may be in any Respect prejudiced by this Act.* It is enacted, *That all and every such Person having any Estate, Right, Title, Debt or Incumbrance whatsoever, in Law or Equity, into, out of, or upon any Castles, Honours, Mannours, &c. or Hereditaments whatsoever, or to any real or personal Estate, or any other the Premises whatsoever in Great Britain, Ireland, or elsewhere, herein before vested in His Majesty, shall, within the Time therein-mentioned, enter all their respective Claims and Demands thereof, before the said Commissioners, to be entred into a Book, and kept in the Manner there appointed, to the End the said Claims or Demands may be fairly heard, and determined, according to such Act or Acts of Parliament as shall, as was heretofore L. 2d.*

From which Clauses, it's plain, That His Majesty is adjudged to be in the actual and real Possession. 2do, That the Rents and Profits of all that is vested in His Majesty, is ordained to be payed into the Receipt of Exchequer. 3rd, That the Creditors or Claimants are directly excluded from the Possession, their Claims being only to be entred and kepted, until they be determined upon by Acts of Parliament afterwards to be made.

And for removing that Pretence, That the Creditors Rights and Debts being secured by the salving Clause, providing, That nothing in this Act shall prejudice or be construed to alter or take away any Benefit competent to them by Virtue of the Act for encouraging Superiors, &c. no more can be understood to be vested in the Crown, but the free Estate after Deduction and Payment of the Debts ; The Lords will please observe, 1mo, The Words of the several Clauses empowering the Commissioners to enquire of forfeited Estates, which do expressly empower them, not only to enquire of the Estates, but of all Incumbrances upon the forfeited Estates ; which Expression does demonstrate, That the Estates forfeited and vested in His Majesty, are vested as they stand burdened with these Incumbrances, and not that the free Estate only is forfeited and vested, otherwise the Act would never mention the Debts and Claims as Incumbrances upon the forfeited Estates, or as Incumbrances upon the Estate vested in His Majesty ; for if no more were vested than the free Estate, after deducing the Incumbrance, then that free Estate would have no Incumbrance ; which plainly shews, That the whole Estate is forfeited and vested in the Crown, tho' with its Burdens ; and consequently that the Possession of the Whole belongs to the Crown, and that the Rents of the Whole are to be payed in to the Receipt of Exchequer ; the Clause anent the Payment of the Rents being as extensive as the other Clause, vesting the Right in the Crown. 2do, The Lords will please observe, That the Rents of all are to be payed in to the Exchequer, that are to be sold conform to after Acts of Parliament : Now it cannot be controverted, but that the Crown, notwithstanding any saving Clause in Favour of the Creditors, is entitled to dispose of the forfeited Estates by Way of Sale, and to apply the Price towards the Payment of the Creditors Debts.

It remains in the third Place to be cleared, That the Right and Possession being thus vested in His Majesty, both by those late Acts of Parliament, and our former Laws, That there can be no Sequestration of these Estates, altho' they be affected with the Debts and Diligences of Creditors : And this will appear, 1mo, From the Consideration of our ancient Laws already noticed, whereby,

tho' the Rights of Creditors were preserved as Burdens affecting the forfeited Estates during some Periods, the whole Debts during other Periods, the real Debts only, yet still the Possession was continued to the Crown, yea even to the Donator, at least for a competent Time, until the Rights of the forfeited Person could be recovered, and the Debts of the Creditors enquired into. 2d^o, Whatever might have been done in other Cases, yet in this there is no Place for Sequestration, because of the express Tenor of the Act of Parliament appointing the Commissioners of Enquiry, which gives the Possession actual and real to the Crown, and appoints the Rents to be payed in to the Receipt of Exchequer, until the Claims be determined upon, or Sale of the Estates made, whereby the Crown has graciously condescended for the Security of the Creditors, as well as the Ease of His Loyal Subjects, to become a Sequester and Trustee, if it may be so expressed, for their common Benefit. 3d^o, This will be yet more plain, if the Nature of a Sequestration, and the Cases in which it does take Place, either by the common Law, or our own Law, be considered. For all Lawyers agree, That it's a Kind of Execution, that it is odious not to be gone into, *nisi ex Causa*, and indeed such Causes, as make it not only reasonable, but absolutely necessary for the Security of Creditors: This cannot be better expressed than in the Words of the learned *Vetus Tit. de Sequestratio Rerum permissa non est, cum Executionis quædam Species sit, a qua haud temere inchoandum, nisi justa quædam Causa subsit, veluti si Periculum sit fore ut litigantes ad Arma veniant, vel Metus Dilapidationis aut Fuga, vel Contumacia Adversarii sui Copiam non facientis, aut ex Judicis Praecepto haud carentis; and a little thereafter, Impeditis tamen plurimisque potest Sequestratio facienda, et que jam facta est in irritum deduci Re restituta, si Possessor Rei idoneam offerat Cautionem de re praestanda, vel restituenda, ubi id sua Juxta Sententia præcepit; and with him all the Lawyers seem to agree.*

* Voet. Tit. depof. §. 14. Zælius Ibid. N 33. Mattheus Disput. 8. Wilenbach Disput. 31. §. 20. Perez ad Cod. Tit. de prohibita Sequestr. Pe-
cun.

These reasonable Positions do apply very closely to the present Case: For, 1m^o, The Crown once being by the Law declar'd to be in the actual and real Possession, the Beginning with Execution against the Crown, and inverting the Crown's Possession before His Advocate had an Opportunity to be heard, and before the Claims of those, who were pleased to begin with the Execution, were any Way inquir'd into, does not seem to be regular. 2d^o, The Crown, nor the forfeited Estates, are not in these Circumstances with Regard to the Claimants, that can give Ground for a Sequestration: It's hop'd, it will not be said, There's any just Ground of Apprehension the Subject will be dilapidated or misapplyed; such Suspicions never do take Place against the Crown and publick Treasury, and much less in this Case, than any other, where His Majesty has graciously been pleas'd, freely to give up His own undoubted Right to the forfeited Estates, and to lodge the same in the Hands of the Publick, or of the Representatives of the Creditors themselves, and to become in Effect only a Trustee, for their Behoof: It must seem very extraordinary if those Creditors (whose whole Rights and Privileges are in a great Measure lodg'd in the Hands of their Representatives, the House of Commons of Great Britain, and, under His Majesty, depend upon their wise Administration) should entertain any Jealousie, That these very Representatives of theirs will misapply this small Fund, which is very inconsiderable, in Comparison of others that depend upon their Management in Prejudice of the Creditors, who are a Part of themselves.

Nor can it with more Reason be said, That there is here a *Contumacia Adversarii sui Copiam non facientis former Debtor*; It will not be said, *in haec tempore have withdrawn*, or that they have yet declined to answer the just Demands of Creditors; on the contrary, very particular Care has been taken of the Creditors Security, and the publick Faith is interpos'd, that when their Claims are stated, suitable Directions will be given for their Payment.

Our own Practice differs Nothing from the common Law, in this Particular; for your Lordships are never in Use to grant Sequestrations, Except, 1m^o, Where there is a probable View given, That the Debt is equal, or near equal, to the Subject affected therewith, and crav'd to be sequestre: Next, where the Possessor of the Estate appears to be insolvent, and so lies under the Suspicion of being tempted; yea, under a Kind of Necessity to dilapidate the Subject of the Creditors Payment, and is not able to find Caution to make the same forthcoming, which will never apply to the Case in Hand, since without descending into the particular Circumstances of the several Estates forfeited, and supposing they were intirely sunk in Debt, still the Publick is responsal for the Value, and hath interpos'd the common Faith, which is a sufficient Security, that the Value shall be duly applied.

And should the Lords depart from these established Rules, for the Application of Sequestration, and should that Diligence come to be practised in a summary Way, without descending to some Trial of the Extent and Foundation of Claims, and of the Credit of the common Debtor possessing every Gentleman's continuing in the Possession of his Estate, would thereby be rendered precarious and uncertain, and the Application of Sequestration would be arbitrary, rather than legal. And, as such summary Sequestrations would be an intolerable Grievance, when practised against private Persons; so the Application of them against the Publick, which can never be supposed to be in these Circumstances, to which Law hath confin'd the Use of Sequestrations, will appear to be of the most dangerous Consequence, to any who will consider the Nature and Circumstance of publick Credit, and reflect on the numerous, tedious and expensive Processe, which constantly attend Sequestrations, to the Hurt, and oft-times, Ruin of both Creditors and Debtor. And it is surprising and extraordinary, to see Creditors make Choice of, or lend their Name to this Method, in Opposition to Exchequer Payments, upon Parliamentary Security, which the Experience of many Ages hath shown to be certain, expeditious, and without Charge.

From

From all which Considerations it's very obvious, That there is no Place for Sequestration against the Crown and Publick in this Case; On the contrary, That the Value of the forfeited Estates being sufficiently secured for the Behoof of the Claimants, in so far as their Debts shall be found just and lawful, His Majesty's Advocate is well entitled to crave the Sequestrations may be taken off, and the Factors remov'd.

What's next to be enquired into, is, How far what's above insisted on is consistent with, and agreeable to the several Clauses in the above-cited Acts, Anno Primo Georgii, whereby it's provided, *That the Rights and Diligences of Creditors shall not be hurt or excluded by the Forfeiture and Attainder of their Debtors.* And it's contended on Behalf of the Crown, That no more is meant or intended by those Clauses, than that the voluntary Rights, such as Wadsets, or Mortgages, Infestments of Annualrent, or the like, and the legal Diligences, that is, Adjudications against the heretale Estate, Arrestments against the Moveables, and in General, all just and lawful Debts, and the Diligences done thereon, should have their full Effect for establishing the Creditors Preferences amongst themselves, and for securing their Payments to be made, according to such Ways and Methods, as the Parliament shall direct, and that those Debts, Rights and Diligences shall not be cut off by the Forfeitures, *but* not that those Creditors should have it in their Power to go on to Execution, and draw their Payment that Way before their Debts be duly stated and legally enquired into: And if this can be made good, then there is no Place for Sequestration, *First*, Because it is a Kind of Execution: *Next*, Because it is not competent, except in those Cases where Creditors could draw their Payment by Execution upon their Diligences, if the Concourse and Clashing of several Diligences did not give Ground for a Dispute as to the Preference, and of Consequence, Place for a Sequestration, to prevent the Perishing and Dilapidation of the Subject during the Dependence of the Dispute anent the Preference.

And, for illustrating that this is the true Meaning of these Clauses, and that they can admit of no other, the Lords will please again to consider, *First*, What has been already noticed, That even, by our former Law, during those Periods of Time when the Security of Creditors was as firmly established, as it now is, (at least of *real* Creditors) a Delay of Payment was reckoned no Hurt or Exclusion of the Creditors Right or Diligence. *2d*, The Lords will please to consider the Terms in which the saving Clause in Favours of the Creditors is conceived; That no Attainder, on Account of the high Treason or Treasons therein above-mentioned, shall hurt or exclude the Right or Diligence of any such Creditor, remaining peaceable and dutiful, for Security or Payment of *any true, just and lawful Debt.* The Debts then secured must be true, just and lawful; which necessarily supposes the Crown must have a competent Time to enquire, if the Debts be true, just and lawful; and of Consequence, That no Execution in the *interim* for Payment can go on. *3rd*, That, by the express Words of the Act, the Claims are to be determined upon, according to Acts of Parliament afterwards to be made, which, by the Nature of the Thing, must supersede Execution in the mean Time, since it were absurd to pretend, a Claim that remains to be enquired into and determined upon, should be allowed to draw its Payment by Execution, and perhaps afterwards be found no just Debt. *4to*, The Lords will please to consider what in other Cases hath been done, *in consideration of such a Clause*, that Creditors Rights or Diligences should not be prejudged. By the *Act of Parliament 10 & 11 Anne,* " That Deeds granted to conjunct Persons, without an onerous Cause, in Prejudice of anterior Creditors, shall be of no Strength, Avail or Effect; and yet such Deeds are sufficient to defend the Obtainer in Possession, until it be reduced: Which shews, That an *interim* Possession, until a Claim (tho' just) be enquired into, and lawfully established, is in Law not looked upon as a Prejudice to that just Claim or Debt. *5to*, Your Lordships will please to observe how this is explained by the very *Act* it self, appointing the Commissioners of Enquiry: For that Clause appointing the Claims to be given in, entred, and kept in the Way therein prescribed, until they be determined upon, begins with these Words, " And that no Person or Persons whatsoever having any Estate, Right, Title, &c. may be in any Respect prejudiced by this *Act.* Whence it's plain, That the suspending the Payment of the Claims until they should be enquired into, and determined upon, is no Prejudice in the Sense of the Legislative, the Makers of this *Act.* And, *Lastly*, Your Lordships will observe, That even by the Method the Claimants themselves seem to make Choice of, *viz.* a Sequestration, their Diligence (in the Sense they are necessitate to explain the Word) is excluded: For, during the Sequestration they can draw no Payment; and consequently, according to their lax Interpretation of the Word *Diligence*, their Diligence is excluded by the Method they themselves make Choice of.

And it's of no Import or Strength what they pretend, That Sequestration is a Diligence at their Instance; for they must certainly either say, That their Diligence is excluded and hurt by the Forfeiture or Attainder of their Debtor, because it stops their drawing Payment by Execution, and makes the Estate continue under Sequestration; Or otherwise they must own, That a Delay of Payment is no Hurt or Exclusion in the Sense of the Law; and if that be acknowledged, their whole Argument falls to the Ground, and their Rights, or the Effect of their Diligence, can never be said to be prejudiced or excluded, when the Rents ly depositate in the Exchequer, or in the Hands of the Crown, more than when they lie in the Hands of a Factor, until the Claims be determined, providing the Creditors be sufficiently secured as to the due Application in the Event, which it's hoped they are: And the Truth is, the Creditors in this Case push their Argument beyond all Reason; for if a Delay of Payment be an Exclusion of their Diligence, Creditors are excluded by every Ranking; and there is no Appearance, that they will in this Case be longer delayed, than the Nature of the Thing necessarily does require; so that upon the

whole, nothing that is here pleaded, on Behalf of the Crown and Publick, tends in the least to weaken or incroach upon that just Security, which the Bounty of the Crown, and the Maxims of a well established moderate Government have indulged to lawful Creditors.

It remains in the last Place to remove the Objections that were propounded by the Claimants against the Demand of the Advocate General's Petition, and what has been above offered in Support thereof. And here it may be proper to make this general Remark on the whole Objections, That none of them offer to reject, or add to the Rules advanced for determining the Cases, in which Sequestration can legally be applied; or at applying any of them to the Sequestrations now in Debate, which, with great Submission, are thought the only Objections could shake the Reasons against the Sequestrations petitioned to be recalled. But to give intire Satisfaction in every Part of the Debate, the Objections offered, in Name of the Creditors, shall be traced in the Method they were advanced. And,

Objection 1. *1mo.* It was objected, and much insisted on, That the Creditors Diligences could not be said, not to be hurt or excluded, if they were debarred from obtaining of Sequestrations, which is one Kind of Diligence; and that if Creditors be excluded from Execution, then the Word *Diligence*, expressly set down in the salving Clause insert in their Favours can have no Meaning.

Ans. 1. It's answered, *1mo.* That this is already obviate by the just Interpretation that has been given of the salving Clause, and Proof that has been offered, That a Stop of Execution, or Delay of Payment till the Claims be inquired into, is not in the Sense of Law, any Hurt, Prejudice, or Exclusion: And that by the Word *Diligence*, in the Act, is understood an Adjudication, or such like legal and judicial Security, in Distinction or Opposition to a voluntary Right.

Ans. 2. *2do.* Tho' Sequestration be a Diligence, it is not competent to Creditors in all Cases, particularly where the Debtor is solvent, or where there is no Fear of Dilapidation: And therefore tho' the Claimants in this Case be debarred from obtaining of Sequestrations, their Diligence is not excluded, because a Sequestration is not a habile Diligence against the Crown or publick Treasury, or against the House of Commons, for whose Behoof the Estates are vested in the Crown, with the Burden of the Creditors Debts, and under whose Care the forfeited Estates now are: Nor can any Instance be given from the *Roman Law*, which our Custom, in the Matter of Sequestrations, hath followed, of a Sequestration obtained against the Fisk, or yet the *Aerarium Publicum*, even where the Fisk had but a small Interest, and where the Subject was burdened with Debts; but still the Possession, and even the Power of Disposal remained in the Fisk, and to the *Procurator Cavaris*; and there was only an Obligation to apply the Price towards the satisfying the just Demand of the Creditors precisely, as in this Case.

This is plain from the Title in the *Cod. de Venditione Rerum Fiscalium cum privatis communium*, and the Lawyers who have writ on that Subject: *Perezius*'s Words, in his Commentary upon it, are distinct, and worth inserting in this Place: *Hic Titulus* (says he) *tractat de quodam Jure singulari Fisco competente, quando Rem babet communem cum Persona privata, ut scilicet totam possit vendere & distrabere, invito Socio;* and that this may not seem confined to the Case where the Fisk has a Property in common with another, your Lordships will please to observe what follows in the *2do. Quod si in Rebus Rerum Fiscalium cum persona privata ante obligata, non ob id impeditur Fiscus vendere, quia & si alii sint pignorata, venduntur cum sua Causa, id est, salvo Jure Pignoris.* And your Lordships will please yet further to observe how that Position, *Salvo Jure Pignoris*, is explained, *Itaque ut facilius Fiscus inveniat, Emptorem permittitur ei Res obligatas vendere, ea Lege, ut prius Creditoribus praecedentibus satisfiat ex Pretio, & superfluum Fisco inferatur, aut si nihil superfit, sed tantum debetur Creditoribus quantum est in Prelio totum id Fiscus illis exsolvet, similiter si terum Premium accepit cum Onere solvendi Creditoribus, iis plene satisfacere cogitur.* All this is directly applicable to the Case in Hand, the Crown and Publick ought to have the Possession and Power of Disposal, but *Salvo Jure Creditorum*, that is, The Creditors must be satisfied in the first Place, out of the Price and Profits.

Objecc. 2. It was objected in the 2d Place, That all the Clauses in the Acts of Parliament, that mention either the Right or Possession to be vested in the Crown, do likewise bear them to be vested for the publick Use; and that Clause ordaining the Rents to be paid in to the Receipt of Exchequer, likewise bears, *For the Use of the Publick*, which joined with the salving Clause in Favour of the Creditors, proves, That no more was vested in the Crown, or to be paid in to the Exchequer than what is for the Use of the Publick; and that agreeably to this there is no Method prescribed for issuing out what shall once be lodged in the Exchequer for the Payment of Creditors; but on the contrary, That the Sums, to be paid in, are appropriated for the publick Use, without Mention of, or Regard to, the Creditors.

Ans. 1. It's answered, *1mo.* That it's already cleared, That the Whole is vested in His Majesty, with the Burden of the Incumbrances; and consequently, That the Whole is to be paid in to the Exchequer.

Ans. 2. *2do.* Tho' the Estates are vested in His Majesty, for the Use of the Publick, it's still without Hurt or Exclusion of the Creditors Rights, and consequently, their Debts become a preferable Burden upon the Particulars vested; whereby, when the Application, either of the Produce or Value of any Estate, comes to be made, the Creditors must be satisfied in the first Place, and the Remainder only be applied to the other Uses of the Fisk; and this is a very common Case: For Instance, If a Disposition be granted to a Trustee, for the Behoof of the Granter's Children, tho' without Mention of Debts; yet the Debts of the Granter will be preferable to the Right of the Trustee, and a Burden upon it; so as these Debts must be satisfied before any Part of the Subject, or Value thereof, can be applied to the Behoof of the Children: Yet nevertheless, the Trustee

Trustee is very properly said to be vested in the whole Right, for the Behoof of the Children; and the applying a Part of the Subject disposed, for Payment of the preferable Debts, would, in such a Case, be adjudged to be an Application for the Behoof of the Children. And therefore, *3to*, The Debt being a preferable Incumbrance upon the Estate, appropriated for the *Ans. 3.* Use of the Publick, the vesting the Estate in the Crown, for the Payment of the Creditors Debts, is a vesting for the Use of the Publick. And the same Reasoning holds, as to the Payment appointed to be made in to the Exchequer, for the publick Use.

4to, This is very plain from the Clause, enacting, That all the Monies to arise to *Ans. 4.* His Majesty, out of the several and respective Estates, other than so much as, by any Clause, or Clauses in this Act, are authorized to be issued for the Salaries of the said Commissioners, or for incident Charges, or for Rewards to Discoverers, or any other Cause touching which any special Provision is made by this Act, are, and shall be appropriated to the Use of the Publick. For *1st*, It's to be observed, That these Words, *Touching which any special Provision is made by this Act*, must refer to the Provisions made by this Act, in Favours of the Creditors: For there is none other mentioned in the Act, to whom they can be applyed. *2do*, That no more is appropriated for the Use of the Publick, in the Sense the Claimants take the Words, than what remains after satisfying these particular Ends, anent which special Provisions are made; and consequently, That there being special Provisions in Favour of the Creditors, the Application for their Behoof, in the first Place, is warranted and authorized by this Act, tho' the particular Method of Application is to be determined, by Acts afterwards to be made.

5to, This is further supported by the Clause, empowering the Commissioners to dispose *Ans. 5.* of Moveables, and ordering the Price thereof to be paid in to the Receipt of Exchequer, for the publick Use, there being no Manner of Question, That the Creditors Debts, and Diligences are secured, so as to affect the Moveables, as well as the heretale Estate; yet the Commissioners are impowered to take Possession, and to dispose of them; and the Money is to be paid in for the publick Use, which fully proves, That the Payment of the Creditors is a publick Use, in the true Intent and Meaning of this Law.

And it's of no Import, what was argued for the Claimants on this Head, That there was Reason for the making the Power of the Commissioners, and Right of the Crown, more extensive as to Moveables than Heretage; because, they may be more easily dilapidate and imbezled; for still the Moveables are vested in the Crown for the publick Use; the Payment of the Price, when they are sold, is to be made into the Exchequer, for the publick Use; yet the Creditors Debts and Diligences are not excluded, even as to Moveables; and consequently, their Payment must be *a publick Use*: And tho' it was pretended, but very faintly, That where Moveables are affected with Diligence, such as, Arrestment, Poinding, or the like, they could not be seized or disposed of by the Commissioners; that cannot hold, nor has it any Warrant from the Law; and were it true, the End of this Law could never be obtained, since Arrestment could nowise hinder Imbezlement or Dilapidation; and poinding can never proceed upon *claims* that remain yet to be inquired into, and to be made upon.

Nor is that Observation of more Import, That there is no Method appointed by the Inquiry Act, for issuing out the Money towards the Creditors Payment, since the Method of their Payment, as well as the Determination of the Validity of their Claims, is to be regulated by an Act, or Acts of Parliament afterwards to be made.

Another Objection offered for the Claimants, was, That by the Inquiry Act, the Exchequer is impowered to cause the Charges of the Commission for Inquiry to be issued, and paid out of such Monies, as shall come, or be brought in to the Exchequer for the publick Use, by Virtue of that Act; whence they did infer, That only the Remainder of the Profits, or Value of the forfeited Estates, after Payment of the Debts, was to be brought in to the Exchequer, since it was not to be presumed, That the Fund of the Creditors Payment was to be applied, for the defraying the Expences of the Commission of Inquiry. *Objec. 3.*

But this Argument proceeds upon a plain Mistake; for tho' the Expences of the Commission are to be defraided out of the Monies paid in for the publick Use; yet still, it's with a Preference to lawful Debts of Creditors, since the salving Clause in their Favour, is to be carried along through the whole Act, and does qualify every Paragraph of it. *Ans. 1.*

The Claimants did yet further object, That supposing a Sequestration could not in this Case regularly have been craved, if the Crown or Publick stood bound for the Creditors Debts; yet, since, neither the Crown nor Publick are bound; but the Rebels alone remain their Debtors, and that they having withdrawn, the Creditors have now nothing to rely upon for their Payment, except the Estates that pertained to the Rebels. They are well entitled to crave a Sequestration, or a *Misso in Possessionem* of the Estates and Effects of their Debtors. *Objec. 4.*

To this it's answered, *1mo*, That supposing neither the Crown, nor the Publick, stood engaged for the Claimants Debts; yet, since the Publick Faith does afford them a sufficient Security, That there is to be no Imbezlement, nor Misapplication of the Profits or Value of those Estates, which is the Fund of their Payment; still there is no Place for a Sequestration. *Ans. 1.*

2do, The Objection seems to proceed on a Mistake in Law; for where-ever an Estate does devolve upon the Fisk, whether by Escheat, Forfeiture, or as Caducary, it devolves *cum suo Onere*, and the Fisk becomes liable to the Creditors, tho' not universally, or *in solidum*; yet still *in Valorem* of the Subject intromettet with; much in the same Manner, as an Executor, or an Heir served *cum Beneficio*, who tho' they are not simply, or universally liable to Creditors, they are always liable to the Value of the Inventory, or Extent of the Effects intromettet with. *Ans. 2.*

* L. 7. D. de
Capit. minut.

That the Fisk is liable, in the same Manner, will be very plain from several Examples, that may be taken from the common Law; as for instance, where a Person underwent a Sentence of *Deportation*; the Fisk became liable for his Debts, to the Extent of his Estate. * And this Matter is distinctly explained in a few Words, by *Melchior de Valentia* in his select Treatises, Lib. 2. Tract. 3. Cap. 1. N. 33. Where he says, *Ubi existente Conditione post Deportationem, diximus Stipulationis Contrarium esse inutilem, & tamen videbatur posse Obligationem consistere in Persona Fisci, quam deportato succedere certum est, animadverti debet Fiscum non representare deportati Personam, nec illius vere Haredem esse, aut Bonorum Possessorem, sed bona cum sua Causa, id est, cum suis Oneribus, & Obligationibus vindicare; ideoque non tenetur in Solidum, nec ultra Vires Hareditatis*: And Lib. 3. Tract. 1. Cap. 3. he delivers the same Sentiments as to other Cases, in which the Estates of private Persons devolve upon the Fisk, N. 20. *Illud annotare in hac Parte, Opera pretium fuerit, licet quoties Fiscus, vel ex Delicto Bona publicata vindicat, vel tanquam ab Indigno auferit, vel ut Caduca acquirit, vel ut Vacantia occupat, verus Hæres non sit, Successorem tamen esse, & ideo teneri Oneribus, & Obligationibus, quibus ille cui successit tenebatur, intra Vires Patrimoni*: So that the Claimants do push this Argument intirely contrary to the Rules of Law, and as much contrary to their own Interests.

It was likewise objected, That the Clause in the Act of Parliament, ordaining the Rents to be payed in to the Exchequer, bears an Alternative, That the Possessors shall pay in the Rents, or hold Compt for the same: And the Claimants do pretend, That the last Part of the Alternative, must, at least, *may*, relate to Payments, made or to be made to Creditors.

This likewise proceeds from a mistaken Notion of the Import and Design of those Words, *bold Compt for*, as will appear from the Consideration of the other Clauses in the Act: The Law has provided, That certain Persons, who either were in Possession before the Rebellion, or before the 24th of June 1715, by Virtue of such Titles as did impower them to possess, and to apply the Profits for their own Use, such as Wadsetters, or those who, by the Clan Act, are entitled to possess without paying any Rent or Duty for their Possessions, to wit, the Tenants of Rebels, continuing Loyal and Dutiful to His Majesty, should continue in that Possession, which either they had before the 24th of June 1715, or were entitled unto by the foreaid Act, and that without paying any Rent into the Exchequer, only they are to hold Compt therefore; It's to those then, and to those only, that these Words, *bold Compt for*, do relate.

And tho' the Claimants did pretend that this was a Gloss, without any Foundation in the Law, the contrary is abundantly plain; for where-ever the Possession is vested in the Crown, there the Rents are ordain'd to be payed in to the Exchequer; but where the Possession is not vested in the Crown, but only the Reversion, as in the Case of a Wadietter in Possession, there no Rent could be payed in; yet still he must hold Compt towards the Extinction of his Debt; and in like Manner, where there is an express Provision, That the Possessor shall pay no Rent, as in the Case of Tenants, there he must only hold Compt; but this Reasoning will never apply to Creditors, who were not in the actual or real and natural Possession before the 24th of June 1715, they having no special Provision in this Act entitling them to enter to the Possession, before inquiring into their Claims; and far

Another Objection offered for the Claimants was, That since the superiors, who (by Virtue of the Clan Act) have Right to the Feus of their Vassals, who happened to be attainted for Treason, are allowed to enter to the Possession of their Vassals Estate, and are not bound to pay the Rents thereof in to the Exchequer; the Creditors ought, in the same Manner, to be allowed to possess, or go on in their Diligence, since their Rights and Diligences are as effectually secured by the Act of Enquiry, as the Right of the Superiors to their Rebel Vassals Feus.

But this is indeed the weakest of all the Objections that have been made: For it's obvious at first View, That neither the Right nor Possession of those Vassals Feus is vested in the Crown, providing the Superior claim his Privilege within the Six Months; but that both do return to the Superior, as by a Resignation *ad Remanentiam*.

The Claimants seem to lay more Stress upon another Objection, which indeed, at first View, hath more Appearance of Strength, but is easily removed; which was, That it could not be the Intent of the Law, That the Rents of all that was vested in the Crown should immediately be paid in to the Exchequer, since the Tenants are entitled to possess Two Years without paying any Rent.

It's answered, *imo*, That where there are no Burdens upon a forfeit Estate, and so the Tenants entitled to possess Two Years without Payment of Rent, no Doubt there is nothing to be paid in to the Exchequer during the Currency of the Two Years; because in that Case the Possession is secured to the Tenants, and not properly vested in the Crown, till after the Expiring of those Two Years, which arises from the special Provision of the Law; but then there is in that Case no Claim to be entred or determined upon: But on the other Hand, where the Estates are incumbered with Debts, so that the Tenants are not (because of the Preference given to the Creditors) entitled to a Possession, without Payment of Rent, but are themselves reduced at most to be Claimants; there again the Rents fall to be paid in to the Exchequer, until the Claims be determined on. And after all, this Objection is not very direct to the Question aenent the Sequestration, since that is certain, That wherever a Tenant is entitled to possess without Payment of Rent, then there can be no Sequestration: So that the Claimants cannot be able to find a Case where the Tenants are entitled to possess without paying in to the Exchequer, and yet a Sequestration proceed in Favours of them the Creditors; and without such a Case can be found, their Argument is not to the Purpose.

Object. 5.

Ans. 1.

Object. 6.

Ans.

Object. 7.

Ans.

It was in the last Place observed by the Claimants by Way of Objection, That the Powers of the Commissioners of Enquiry, given them by this Act of Parliament, are not so express or extensive, as to the selling or disposing of forfeit Estates, or levying the Profits thereof, as the Powers given to the Trustees of the forfeited Estates in *Ireland* were; Whence it was inferred, That it could not be the Meaning of the Legislative, That the Commissioners of Enquiry should have Power to levy the Profits, and uplift the Rents of the Estates forfeited by the late Rebellion, otherwise an express Power would have been given them.

But, *imo*, This Observation is intirely foreign to the present Question: For the Debate is not here, How far the Commissioners of Enquiry's Power does extend, as to the levying of Rents? But, Whether or not the Possession be vested in the Crown, and the Rents be to be levied by the Publick? For if it should be granted, That the Commissioners have not a Power to levy the Rents, the Consequence of this would only be, That they are to be levied according to the common Course of Law, by Action and Distress, at the Instance of His Majesty's Advocate, as in other Cases the Rents and Duties payable to the Crown are: And the Law hath indeed made such Provision as will in most Cases prevent the Necessity of ~~any~~ Action or Distress at the Crown's Instance at all, having imposed so high Penalties upon those who shall wilfully omit or neglect to pay in their Rents, in the Manner that by that Law is directed, which was precisely the Method in *Ireland*, without any further Powers to the Trustees as to levying Rents, than what the Commissioners have.

2do, That Act, constituting the Trustees on the forfeited Estates in *Ireland*, affords a very strong Argument on Behalf of the Crown in this Case; for by that Act several Claims and Incumbrances into, out of, and upon these forfeited Estates were secured, and declared to stand valid, as effectual Burdens; yet the Trustees were impowered to levy and intromet, and the Claimants neither pretended to Possession, nor Sequestration, but rested satisfied with the Security given them, that their Claims would be duly satisfied after they were enquired into, which was accordingly done, and no Doubt will likewise be done to Satisfaction in the present Case.

There was a separate Argument insisted on, in Behalf of the Crown, Why the Factors in this Case ought to be removed? which was, That these Factors were granted in Absence of His Majesty's Advocate, where the Crown neither was compreating, nor bound to be present; and were there no more to be said for removing of the Factors, this ought to prevail with the Lords, at least to put the Crown in the same State as before the granting those Factors: The Maxim, That *spoliatus est ante Omnia restituendas*, may in some Measure apply to the Case in Hand; the Crown was once vested in Possession by the Act for enquiring, &c. The Claimants thought fit summarily to invert that Possession, without giving the Crown an Opportunity to be heard; And therefore in the first Place, The Possession ought to be restored, leaving to the Claimants to prosecute all Manner of Diligence they shall afterwards find competent to them.

Nor will there be found one single Instance of a Sequestration obtained, where the Possessor was not either called, or voluntarily listed himself; for in all Rankings, the common Debitor is alwise called one Way or other: If it be a Ranking in Order to a Sale, he is called in the very Summons; if the Ranking begin by a Multiplication, scarce ever will it happen, but that one of those who competes, is an Annualrenter, pursuing a Pounding of the Ground, and there the Debtor must be called, so that really no Instance will, it's believed, be found, where a Possessor, owning his Right and Possession, was summarily turned out of that Possession, without being brought into the Field one Way or other.

The Lawyers do observe from the common Law, That *si fiscales Causa non interveniente Fisci Advocate decisi sunt in Integrum Restituuntur, aut si absente Fisci Advocate pronunciatum sit, nihil adsum esse, & ideo ex Integro cognosci oportere*; and this held even *cum pronunciatum erat in Favorem Libertatis*; tho' such Sentences were scarce reducible on any Ground whatsoever, how much more ought the Crown to be restored in this Case, where so many other pregnant Grounds concur with that of the Absence of the Advocate.

And here it is not to be understood, That these, who plead in Behalf of the Crown, do encline to enter into the Detail of the many Irregularities that may be found in the several Factories, and the Factors themselves: This is a general Ground insisted upon, that touches all the Factories, and for which they ought once to be taken off; and if the Claimants can show Ground for renewing them after once the Crown is put in its own Place, that may be left entire to them.

Upon the whole Matter, it's hoped the Lords will be persuaded, That the Claimants in this Case rather state themselves as Oppofers to the Demand of the Advocate General's Petition, from an anxious, groundless, unseasonable, and ill placed Jealousie, than from any real Interest they have to oppose it in this Manner: The Bounty of the Crown, and Indulgence of a moderate Government, has secured their lawful Debts in the strongest Manner against the hard and rigorous Effects of former Forfeitures; the King has graciously condescended to renounce his own undoubted Right to the forfeited Estates, for the Ease and Benefit of his Subjects, and has lodged the Management thereof in the Hands of the Representatives of the Creditors themselves, the Commons of Great Britain. And it is worthy of Observation, That the giving to the Use of the Publick what of right appertains to the King's private Fisk, hath been the Practice of these Princes, who have been most remarkable for their Virtue and Honour*. After all this, what Ground can there be for the Claimants, once to suspect the Subject of their Payment will be misapplied, or to show the least Diffidence, either of the Publick Faith, or publick Administration; It's hoped there can be none at all, and that therefore the Lords will take off those Factories, which the Claimants groundless Jealousies at first excited them to demand, and leave the Management of the forfeited Estates to the Care of the House of Commons, to whom of Right it does belong.

In Respect whereof, &c.

R. DUNDAS.

Peregrinus Tit. ad
Sententias adversus
Fiscum latis retrac-
tandis.

* Spartan. in Advi-
ano damnatorum Bo-
na in Fiscum priva-
tum redigi vetus, omni
ni Summa in Aerario
publico recepto.

Plin. in Panagi-
rico Trajanis, affor-
tose non eadem securi-
tate Fiscum, quia E-
rarium cobibes, mo-
tanto majore, quanto
Plus tibi licere de tuo,
quam de publico ex-
dis.

INFORMATION

In Name of
His Majesty's Advocate General

AGAINST

The Claimants upon the Estates
in Scotland, forfeited by the late
Rebellion.

January 7th, 1712.